A

Gurdev Kaur a/p Bhag Singh v Affin Bank Bhd (which has taken over all the assets and liabilities BSN Commercial Bank (M) Bhd by court order dated 18 December 2000)

B

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-969–10 OF 2011
S M KOMATHY JC
C 14 MAY 2014

Civil Procedure — Judgments and orders — Setting aside — Whether order of court may only be declared null and void and set aside in proceedings

D

Civil Procedure — Pleadings — Parties bound by — Fact that order of court void and should be set aside not pleaded — Whether party can argue unpleaded case

E

Land Law — Charge — Foreclosure — Several charges over property — Court order authorising charge to use proceeds of sale to satisfy amounts due under second to fourth charges — Whether surplus monies remaining after satisfaction of first charge ought to have been returned to chargor — Whether charge only entitled to F *deduct legal fee on a solicitor/client basis after taxation — Whether amounts obtained by charge from earlier aborted sale must be refunded to chargor — Whether chargor barred by doctrine of res judicata and estoppel from challenging validity of earlier court order — Whether earlier court order void for illegality for breach of ss 256(2) and 254 of the National Land Code ('NLC')* G *— Whether s 245 of the NLC applicable in foreclosure proceedings*

The plaintiff had charged her property to the defendant, and also to BSNC Leasing (M) Sdn Bhd for various loans. There were at the material time, four registered charges on her property. On 17 October 2002, the court made an H order ('the said order') that the defendant was authorised to use the proceeds of sale to satisfy the amounts due under the second to fourth charges. On 12 March 2007, the property was sold for a sum of RM3,150,000 to the successful bidder. All four charges on the property were thereafter deleted pursuant to s 267(1)(a) of the National Land Code ('the NLC'). The sale I proceeds were used to satisfy the full amount due under the first and the second charge, and a portion of the third charge. There were insufficient funds to satisfy all the four charges on the property. The plaintiff claimed that the surplus monies remaining after the satisfaction of the amount due under the first charge, ought to have been returned to her instead of being utilised to

satisfy the other charges. On 29 September 2011, the plaintiff commenced this action to challenge the validity of the manner in which defendant had utilised the proceeds of sale realised from the foreclosure action. The plaintiff sought, inter alia, the following declarations: (a) that, as the second and third charges were not consolidated, the defendant was not entitled to deduct the liabilities arising under the charges from the sales proceeds; (b) that the defendant was only entitled to deduction of legal fee on a solicitor/client basis after the same has been taxed and as such the deduction of the sum of RM432,656.08 as legal fees by the plaintiff was wrongful and ought not to be allowed; and (c) that the sum of RM220,700 obtained by the defendant from an earlier aborted sale be refunded to the plaintiff. The following issues arose for determination: (i) whether the plaintiff was barred by the doctrine of res judicata and estoppel from challenging the validity of the said order. The issue was whether the said order precluded the plaintiff from challenging the utilisation of the sale proceeds to satisfy the remaining charges; (ii) whether the said order was void for illegality for breach of ss 256(2) and 254 of the NLC. Clauses 34 and 35 in the charge annexure provided that s 245 of the NLC (restricting the right of consolidation) shall not apply to the security granted herein; (iii) whether the deduction of RM432,656.08 as legal fees from the proceeds of sale was wrongful as it was done without first rendering her a bill and taxing the same; and (iv) whether a sum of RM220,700 that was forfeited by the defendant from an earlier aborted auction was credited to the plaintiff's account to reduce her indebtedness. The plaintiff contended that the defendant failed to produce evidence to show that the monies had been credited to the plaintiff's account to reduce her indebtedness. According to the plaintiff, the defendant's failure to produce the bank ledger to establish that it had credited the monies, called for an adverse inference to be drawn against the defendant.

Held, dismissing the plaintiff's claim with costs of RM10,000:

(1) It was not the pleaded case of the plaintiff that the said order was void and should therefore be set aside. A party is bound by its pleaded case and cannot argue an unpleaded case (see para 22).

(2) The rule laid down in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 that an order of court may only be declared null and void and set aside in proceedings brought for that purpose, precluded the plaintiff from challenging the validity of the said order in these proceedings. Hence, the utilisation of the proceeds of sale in accordance with the said order was valid and could not be challenged in these proceedings (see para 23).

(3) Section 245 of the NLC and cll 34 and 35 had no application in foreclosure proceedings. There is no nexus between foreclosure proceedings and the said provisions. The right given to the defendant in cll 34 and 35 that it may require the plaintiff to redeem all the charges at

the same time, does not impose an obligation on the defendant to consolidate all the charges in order to be entitled to apply the sale proceeds in accordance with s 268 of the NLC (see para 35).

(4) The defendant had provided the plaintiff with a copy of the statement of accounts. It reflected that the defendant had deducted a sum of RM432,656.08 as legal fees for work done in relation to the first charge. It was common ground that pursuant to the terms of the first, second and third charges, the plaintiff had agreed to pay the legal fees of the defendant's solicitors on a solicitor and client basis. The earlier bill of costs had been withdrawn by the defendant at the request of the plaintiff and the law does not allow a party to approbate and reprobate. Having earlier elected not to proceed with taxation, it was not permissible for the plaintiff to take a contrary and inconsistent position now. Therefore the defendant's deduction of the legal fees amounting to RM432, 656.08 from the sale proceeds was not wrongful (see paras 41 & 45).

(5) The statement of accounts showed that the deposit was taken into account in reducing the plaintiff's indebtedness. There was no evidence to suggest that the statement of accounts was inaccurate or unreliable. The non-production of the bank ledger did not call for the invocation of an adverse inference in the absence of evidence to show that it was being withheld by the defendant (see para 48).

[Bahasa Malaysia summary

Plaintif telah memajak hartanahnya kepada defendan dan juga BSNC Leasing (M) Sdn Bhd bagi pelbagai pinjaman. Pada masa material, terdapat empat pajakan berdaftar ke atas hartanahnya. Pada 17 Oktober 2002, mahkamah mengeluarkan perintah ('perintah tersebut') bahawa defendan mempunyai kuasa untuk menggunakan hasil jualan untuk membayar jumlah terhutang di bawah pajakan kedua hingga keempat. Pada 12 Mac 2007, hartanah tersebut dijual bagi jumlah RM3,150,000 kepada pembida yang berjaya. Keempat-empat pajakan pada hartanah kemudiannya diketepikan di bawah s 267(1)(a) Kanun Tanah Negara. Hasil jualan kemudiannya digunakan untuk membayar jumlah penuh yang terhutang di bawah pajakan pertama dan kedua dan sebahagian pajakan ketiga. Tidak terdapat dana yang mencukupi untuk membayar keempat-empat pajakan ke atas hartanah. Plaintif mendakwa bahawa lebihan wang selepas pembayaran jumlah yang terhutang di bawah pajakan pertama sepatutnya dipulangkan kepadanya dan bukan digunakan untuk membayar pajakan-pajakan lain. Pada 29 September 2011, plaintif memulakan tindakan ini untuk mencabar kesahan cara defendan menggunakan hasil-hasil jualan yang direalisasikan daripada tindakan rampasan. Plaintif memohon, antara lain, bagi pengisytiharan-pengisytiharan: bahawa, oleh kerana pajakan kedua dan ketiga tidak digabungkan, defendan tidak berhak menolak liabiliti-liabiliti yang berbangkit daripada pajakan daripada hasil jualan; bahawa defendan hanya berhak ke atas penolakan yuran

guaman atas dasar peguamcara/anak guam selepas kesemuanya telah dikenakan cukai dan dengan itu, penolakan jumlah RM432,656.08 sebagai yuran guaman oleh plaintif adalah tidak sah dan tidak sepatutnya dibenarkan; dan bahawa jumlah RM220,700 yang diperolehi daripada defendan daripada jualan yang dahulunya ditamatkan diserahkan kepada plaintif. Isu-isu berikut timbul bagi pemutusan: sama ada plaintif terhalang oleh doktrin res judicata dan estopel daripada mencabar kesahan perintah tersebut. Isunya adalah sama ada perintah tersebut menghalang plaintif daripada mencabar penggunaan hasil jualan untuk membayar lebihan pajakan; sama ada perintah tersebut terbatal atas sebab ketaksahan kerana melanggar ss 254 dan 256(2) KTN. Klausa 34 and 35 dalam lampiran pajakan memperuntukkan bahawa s 245 KTN (menyekat hak menggabung) tidak akan terpakai ke atas cagaran yang diberikan di bawah; sama ada penolakan RM432,656.08 sebagai yuran guaman daripada hasil jualan adalah salah kerana ia dilakukan sebelum terlebih dahulu memberikan bil dan mengenakan cukai atasnya; dan sama ada jumlah RM220,700 yang dilupuskan oleh defendan daripada bidaan terdahulu yang ditamatkan dikreditkan ke dalam akaun plaintif untuk mengurangkan keberhutangannya. Plaintif menghujahkan bahawa defendan gagal mengemukakan keterangan untuk menunjukkan bahawa wang telah dikreditkan ke dalam akaun plaintif untuk mengurangkan keberhutangannya. Menurut plaintif, kegagalan defendan untuk mengemukakan lejar bank untuk membuktikan bahawa ia telah mengkreditkan wang tersebut, membangkitkan anggapan bertentangan terhadap defendan.

Diputuskan, menolak tuntutan plaintif dengan kos sebanyak RM10,000:

(1) Ia bukan kes yang diplidkan oleh plaintif bahawa perintah tersebut adalah terbatal dan dengan itu harus diketepikan. Satu-satu pihak itu terikat dengan kes diplidkan dan tidak boleh menghujahkan kes yang tidak diplidkan (lihat perenggan 22).

(2) Peraturan yang dinyatakan dalam *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 bahawa satu perintah mahkamah hanya boleh diisytiharkan sebagai terbatal dan tidak sah dan diketepikan dalam prosiding yang dikemukakan bagi tujuan tersebut, mengecualikan plaintif daripada mencabar kesahan perintah tersebut dalam prosiding sebegini. Oleh itu, penggunaan hasil jualan selaras dengan perintah tersebut adalah sah dan tidak boleh dicabar dalam prosiding sebegini (lihat perenggan 23).

(3) Seksyen 245 KTN dan klausa 34 dan 35 tidak terpakai dalam prosiding lelongan. Tiada perkaitan antara prosiding lelongan dengan peruntukan-peruntukan tersebut. Hak diberikan kepada defendan dalam klausa 34 dan 35 bahawa ia memerlukan plaintif menggadaikan kesemua pajakan pada masa yang sama, tidak mengenakan kewajipan ke atas defendan untuk menggabung kesemua pajakan di bawah perintah

agar dia berhak memohon bagi hasil jualan selaras dengan s 268 KTN (lihat perenggan 35).

(4) Defendan telah mengemukakan sesalinan penyata akaun kepada plaintif. Ia menunjukkan bahawa defendan telah menolak sejumlah RM432,656.08 sebagai yuran guaman bagi kerja-kerja yang telah diselesaikan untuk pajakan pertama. Ia adalah titik persamaan bahawa menurut di bawah terma-terma pajakan pertama, kedua dan ketiga, plaintif telah bersetuju untuk membayar yuran guaman kepada peguamcara defendan pada dasar peguamcara dan anak guam. Bil kos terdahulu telah ditarik balik oleh defendan atas permintaan plaintif dan undang-undang tidak membenarkan satu pihak bersetuju atau tidak bersetuju. Setelah memilih untuk tidak meneruskan dengan taksiran, plaintif kini tidak dibenarkan untuk mengambil kedudukan yang bertentangan. Oleh itu, penolakan defendan terhadap yuran guaman berjumlah RM432,656.08 daripada hasil jualan adalah tidak salah (lihat perenggan 41 & 45).

(5) Penyata akaun menunjukkan bahawa deposit diambil kira dalam menolak keberhutangan plaintif. Tiada keterangan untuk mencadangkan bahawa penyata akaun adalah tidak tepat atau tidak boleh disandarkan. Kegagalan mengemukakan lejar bank tidak membangkitkan anggapan bertentangan dengan ketiadaan keterangan untuk menunjukkan bahawa ditahan oleh defendan (lihat perenggan 48).]

Notes

For cases on setting aside, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5183–5250.

For cases on parties bound by, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6840–6846.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (folld)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

Public Finance Bhd v Hock Seng Housing Development Sdn Bhd (see Ha Chai & Ors, Interveners) [1992] 1 MLJ 442, HC (refd)

Legislation referred to

Legal Profession Act 1965 ss 123, 124(1), (2)

National Land Code ss 245, 254, 256(2), 267(1)(a), 268, 268A, Form 16D

RK Nathan (Vinod Kamalanathan & Assoc) for the plaintiff.

Bahari (Muhamad Daniel with him) (Lee Hishamuddin Allen & Gledhill) for the defendants.

S M Komathy JC:

INTRODUCTION

[1] The plaintiff, a housewife, had charged her property to Affin Bank Bhd, the defendant in this action, and also to BSNC Leasing (M) Sdn Bhd for various loans. There were at the material time, four registered charges on her property. Her property was foreclosed under the first charge and sold by way of public auction. The proceeds of sale realised from the sale were utilised to satisfy the plaintiff's indebtedness under the first charge, and the surplus was used to satisfy the amounts due under the remaining charges.

[2] On 29 September 2011, the plaintiff commenced this action to challenge the validity of the manner in which defendant had utilised the proceeds of sale realised from the foreclosure action. The reliefs she seeks are set out in paras 26 and 27 of her statement of claim as:

> (i) a declaration that as the second and third charges were not consolidated, the defendant is not entitled to deduct the liabilities arising under the charges from the sales proceeds, as follows;
>
> (a) RM1,318,912.97 as at 12 March 2007; and
>
> (b) RM32,536.32 as at 12 March 2007
>
> (1) a declaration that the defendant is not entitled to any interest six (6) years after the service of the respective Form 16D notices in respect of all three (3) charge;
>
> (iii) a declaration that the defendant is only entitled to deduction of legal fee on a solicitor/client basis after the same has been taxed. The deduction of the sum of RM432,656.08 as legal fees by the plaintiff was wrongful and ought not to be allowed.
>
> (iv) an order that the sum of RM192,717.93 as from 12 March 2007 which was wrongly retained by the defendant in respect the first charge be paid to the plaintiff.
>
> (m) an order that the sum of RM6,806.60 be refunded to the plaintiff with interest at the rate of 8%pa from the date the Court of Appeal set aside the judgment dated 4 November 2004;

(vi) an account be taken on the amount sum of RM161,847.60 expended the miscellaneous expenses incurred by the defendant in respect of the auction sale and a further that all amounts not duly accounted be refunded to the plaintiff; and

(vii) an order that the sum of RM220,700.00 obtained by the defendant from the aborted sale be refunded to the plaintiff with interest of 8%pa from the date of settlement.

27. The plaintiff prays for an order that interest at a rate of 8%pa be paid by the defendant to the plaintiff, as follows;

(a) (i) a sum of RM 192,717.93 as from 12 March 2007;

(ii) a sum of RM594,503.68 as from 12 March 2007;

(iii) a sum of RM1,318,912.97 as from 12 March 2007

(iv) a sum of RM32,536.32 as from 12 March 2007;

(v) a sum of RM220,700.00 as from 1 March 2005; and

(vi) a sum of RM6,806.60 as from 19 July 1999.

(b) General Damages;

(c) Costs; and/or

(d) any other relief to which this Honourable Court deems fit.

NARRATIVE

[3] The dispute between the parties arose this way. The defendant provided a housing loan of RM750,000 to the plaintiff for the purchase of a property held under CT No 13773 (Grant No 27032) Lot No 48 Section 97 Town of Kuala Lumpur, Wilayah Persekutuan together with a three storey bungalow house ('the property') situated thereon.

[4] A first party charge was created over the property in favour of the defendant ('the first charge').

[5] The defendant also granted banking facilities to a company called KDG Holdings (M) Sdn Bhd ('KDG'). The plaintiff was one of the guarantors and also charged the property to the defendant as security ('the second charge').

[6] Upon KDG's inability to service the loan, the defendant commenced proceedings for recovery of the amount due and owing in Kuala Lumpur High Court, Suit No D2-22–1307 of 1997. On 7 January 1999, the High Court allowed summary judgment against KDG and two guarantors, namely the plaintiff and one Balwan Singh, whereupon the plaintiff appealed. The Court

of Appeal dismissed KDG's appeal but allowed the appeal by the guarantors. The claim against the guarantors, which included the plaintiff, was remitted back to High Court for full trial. The defendant subsequently withdrew the claim against the guarantors on the basis that the amount due and owing under the KDG loan has been fully settled via the sale proceeds.

[7] The defendant also granted banking facilities to a company called Le Pacileon (M) Sdn Bhd ('Le Pacileon'). The plaintiff stood as one of the guarantors and also charged the property to the defendant as security ('the third charge'). When Le Pacileon defaulted in its loan payments, the defendant commenced proceedings against Le Pacileon and its guarantors in Summons No 8–52–14340 of 1999 for recovery of the amount due and owing. On 4 July 2000, the defendant obtained summary judgment against Le Pacileon and its guarantors.

[8] The plaintiff had also charged her property to BSNC Leasing (M) Sdn Bhd for another loan facility ('the fourth charge').

[9] The plaintiff defaulted in repayment of the first housing loan whereupon the defendant issued a Form 16D requesting the plaintiff to remedy the breach. Foreclosure proceedings were commenced when the plaintiff failed to do so. An order for sale was granted by the High Court on 23 August 2001 ('order for sale'). The plaintiff's appeal to the Court of Appeal and Federal Court against the granting of the order for sale were dismissed.

[10] In the meantime, the plaintiff also commenced a fresh Originating Summons No S2-24–3563 of 2002 to declare the order for sale null and void. Her application was dismissed by the High Court and she also failed in her bid to reverse the decision in the Court of Appeal. The plaintiff then filed several applications to stay the auction of the property, but all these applications were dismissed both by the High Court and Court of Appeal.

[11] On 12 March 2007, the property was sold for a sum of RM3,150,000 to the successful bidder. All four charges on the property were thereafter deleted pursuant to s 267(1)(a) National Land Code ('the NLC') and the successful bidder who had purchased the property at the auction, obtained the property free from all encumbrances. The sale proceeds were used to satisfy the full amount due under the first and the second charge, and a portion of the third charge . There were insufficient funds to satisfy all the four charges on the property.

[12] The plaintiff now contends that the surplus monies remaining after the satisfaction of the amount due under the first charge, ought to have been returned to her instead of being utilised in the above manner and therefore, brought this action.

ORDER OF THE COURT DATED 17 OCTOBER 2002

[13] As noted earlier in para (9) above, the defendant had on 23 August 2001, obtained an order for sale of the plaintiff's property by way of public auction under the first charge. The defendant then applied for summons for directions in relation to the sale of the property. On 17 October 2002, the court made an order allowing the bank to deduct from the proceeds of sale, the following amounts:

(a) the judgment sum in respect of KDG Loan – RM833,967.49;

(b) the judgment sum in respect of Le Pacileon – RM164,449.87; and

(c) the amount outstanding under the fourth charge – RM846,958.42.

[14] The legal effect of this order was that the defendant was authorised to use the proceeds of sale to satisfy the amounts due under the second to fourth charges.

THE ISSUES

[15] The arguments of the parties raised four issues, namely:

(a) whether the plaintiff is barred by the doctrine of res judicata and estoppel from challenging the validity of the order of court dated 17 October 2002?

(b) if not, whether the order made on 17 October 2002 is void for illegality?

(c) whether the deduction of RM432,656.08 as legal fees from the proceeds of sale was wrongful? and

(d) whether a sum of RM220,700 that was forfeited by the defendant from an earlier aborted auction was credited to the plaintiff's account to reduce her indebtedness.

First issue: Res judicata

[16] The first issue for consideration is whether the order of court dated 17 October 2002, precludes the plaintiff from challenging the utilisation of the sale proceeds to satisfy the remaining charges. The salient facts relevant to this issue are as follow. On 17 October 2002, the court made an order permitting the defendant to deduct the amount due under the first charge from the

proceeds of sale. Next, and crucially, the court further permitted the defendant, despite the strong objections advanced by the plaintiff, to utilise the surplus sale proceeds to satisfy the amounts due under the remaining charges. No appeal was brought against the above order of 17 October 2002, though it was open to the plaintiffs to do so.

[17] Whereupon, the defendant proceeded with the auction and the property was sold on 12 March 2007 for RM3,150,000. The proceeds of sale were distributed in accordance with the court order of 17 October 2002 and ss 268 and 268A of the ('NLC').

[18] Having elected not to appeal against the said court order, is the plaintiff entitled to challenge its validity in the present action and ask this court now to set aside an order made by another High Court?

[19] This point was considered by the Federal Court in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143. The court held that one High Court cannot set aside a final order regularly obtained by another High Court of concurrent jurisdiction. The order can only be corrected on appeal as the doctrine of res judicata and estoppel would preclude the court from setting aside the order.

[20] The plaintiff contended that the doctrine of res judicata and estoppel had no application to the instant case as the order of 17 October 2002, was void and made in breach of ss 256(2) and 254 of the NLC and thus can be set aside. She referred to the oft-quoted decision of the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysia Finance Bhd* [1998] 1 MLJ 393 in support of this argument. The following passage at p 426 of the judgment of Gopal Sri Ram JCA was read in support:

> It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v Robertson* is certainly not authority for the latter proposition. I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, *upon the illegality being clearly shown*, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. (Emphasis added.)

[21] The defendant accepted the proposition that an illegal order made by one High Court can be set aside by another High Court, but pointed out that

A the Court of Appeal in *Badiaddin* had expressly stated that an order which is illegal can only be set aside in proceedings brought for that purpose. It was pointed out that there was no indication in the statement of that the present proceedings have been brought to set aside the order dated 17 October 2002 on the basis that it was null and void. It was argued that the averments in the B statement of claim demonstrated that the present action was bought for the purpose of challenging the inclusion of the judgment sums of RM833,967.49 and RM164,449.87 in the foreclosure proceedings, on the basis that the defendant was no longer entitled to deduct these monies from the sale proceeds as summary judgment and bankruptcy proceedings against the plaintiff have C been set aside. It was argued that the plaintiff was bound by her pleading and cannot stray from it.

[22] In my judgment, there is merit in the submissions of the defendant. A D close examination of the statement of claim indeed supports the contention of the defendant that it is not the pleaded case of the plaintiff that the that the order 17 October 2002 is void and should therefore be set aside. It is a well established principle that a party is bound by its pleaded case, and cannot argue an unpleaded case. Cases must be decided on the issues on record and where a E party desires to raise unpleaded points, they must be placed on the record by amendment. It is imperative to ensure that a defendant is only required to answer the pleaded case of the plaintiff as a failure to observe this rule would lead to uncertainty and chaos in litigation.

F **[23]** I accept the submission of the defendant that the rule laid down in *Badiaddin* that an order of court may only be declared null and void and set aside in proceedings brought for that purpose, precludes the plaintiff from challenging the validity of the order 17 October 2002 in these proceedings. In the result, the utilisation of the proceeds of sale in accordance with the said G order is valid and cannot be challenged in these proceedings.

Second issue: Whether the order made on 17 October 2002 is void for illegality?

H **[24]** In the event, my conclusion on the first issue is wrong, and the plaintiff is entitled to challenge the order 17 October 2002 in the present proceedings, it becomes necessary for me to consider whether the said order is null and void for breach of ss 256(2) and 254 of the NLC.

I **[25]** Sections 256(2) and 254 of the NLC permit a chargee to foreclose a property charged to it as security upon default by the chargor by giving notice in Form 16D to the latter to remedy the breach within one month. Upon the failure of the chargor to do so, the chargee can apply for an order for sale of the charged property.

[26] In the present case, it is common ground that only one statutory notice under Form 16D was issued to the plaintiff under s 254 of the NLC, in respect of the first charge. No Form 16D notices were given to the plaintiff in respect of the remaining three charges. The plaintiff contended that since no Form 16D notices were given in respect of the remaining three charges, this indicated that the bank had elected to proceed to recover the monies lent in respect of these charges, by way of an action in personam as evidenced by the two civil actions it had instituted. Having elected to do so, it was not permissible for the defendant to include the judgment sums obtained in those civil actions to the foreclosure proceedings, which is an action in rem.

[27] The plaintiff contended that the omission to give the Form 16D notices in respect of the second, third and fourth charges also precluded the defendant from utilising the sale proceeds to satisfy the amounts due under these charges. It was said that the only permissible way this could have been done was if the defendant had applied for an order to consolidate all the four charges. A consolidation order would have entitled the defendant to issue only one Form 16D notice, instead of issuing four separate notices. In the absence of a consolidation order, a chargee is not entitled to utilise the surplus monies as provided in s 268 of the NLC. This submission was premised on s 245 of the NLC and cll 34 and 35 in the charge annexure of the second charge and third charge, respectively. I interpolate to add that cll 34 and 35 are identical, and the same provision is also found in the first and the fourth charges. It was said that the inclusion of cll 34 and 35 in the charges rendered s 268 inapplicable.

[28] The plaintiff relied on the decision of Abdul Malek J in *Public Finance Bhd v Hock Seng Housing Development Sdn Bhd (See Ha Chai & Ors, Interveners)* [1992] 1 MLJ 442 in support of her proposition that in the absence of a consolidation order, a chargee was not entitled to use the surplus sale proceeds to satisfy the amounts due and owing on the remaining charges.

[29] The defendant's response was that s 245 of the NLC and cll 34 and 35 had no application to foreclosure proceedings as they specifically deal with the rights of the chargor to redeem or discharge the charges on his property. It was said that this is demonstrated by the fact that provisions dealing with foreclosure proceedings and the redemption of charges are found under separate chapters under the NLC.

[30] The defendant further contended that the position taken by the plaintiff that a consolidation order was an essential requirement in view of cll 34 and 35 was misconceived and contrary to ss 268 and 268A of the NLC. There was nothing in s 268 to support this interpretation. Section 268 is a mandatory provision which imposed on the defendant a statutory obligation to use the surplus ,if any, after the satisfaction of the amount due under the first

charge, to satisfy the amount due under the remaining charges on the property. The rationale for the surplus to be applied in this manner was because upon the sale of the foreclosed property, all remaining chargees would loose their security as the successful bidder was entitled to obtain the property free of encumbrances by operation of law as provided by s 267(1)(a) of the NLC. It was said that it was for this reason, the remaining chargees need not be armed with a judgment or foreclosure order in order to be entitled to the proceeds of sale .

[31] The defendant also disputed that the case of *Public Finance Bhd v Hock Seng* cited by the plaintiff supported the proposition advanced by her. It was argued that, on the contrary, the decision supported the case for the defendant that consolidation was not an essential requirement.

[32] In view of the conflicting positions taken by the parties on the applicability of s 245 of the NLC and cll 34 and 35 to foreclosure proceedings, it is necessary to examine what these provisions say. Section 245 provides:

> In the absence of any express provision therein to the contrary, a person seeking to discharge any charge may do so without making any payment to or towards the discharge of any other charge created by him, or any person through whom he claims, on property other than that comprised in the first-mentioned charge.

And cll 34 and 35 provide:

> Section 245 of the National Land Code (restricting the right of consolidation) shall not apply to this security and it is hereby expressly agreed and declared that unless the Bank otherwise agrees this charge shall not be discharged except on payment by the chargor(s) of not only all monies secured hereby but also all monies secured by any other charge created by the chargor(s) or by any person through whom the chargor(s) claim(s) in favour of or vested in the bank.

[33] A plain reading of s 245 of the NLC indicates that it confers on a chargor, who has several charges registered on his property, the right of choice or option to discharge or redeem any one of these charges, first. He is not required to redeem all these charges at the same time and he does not also require the consent of the chargee.

[34] The insertion of cll 34 and 35 in the charge annexure, however, appears to take away the right of choice given to the plaintiff under s 245 of the NLC. Pursuant to these clauses, the plaintiff can only exercise the right conferred by s 245 of the NLC with the consent of the defendant. Consequently, the defendant would be entitled to refuse to give permission to the plaintiff to discharge one of these charges, first, and insist that all charges must be redeemed at the same time.

[35] An examination of the above provisions compels me to conclude that the defendant is right in its submission that s 245 and cll 34 and 35 have no application in foreclosure proceedings. I am unable to see the nexus between foreclosure proceedings and the said provisions. The right given to the defendant in cll 34 and 35 that it may require the plaintiff to redeem all the charges at the same time, in my judgment, does not impose an obligation on the defendant to consolidate all the charges in order to be entitled to apply the sale proceeds in accordance with s 268 of the NLC.

[36] Section 268 of the NLC provides:

(1) The purchase money arising on any sale under this Chapter shall be applied as follows –

(a) firstly, in the payment of rent to the State Authority or the lessor (according as the charge was a charge of land or of a lease) and, so far as no person other than the chargor was responsible therefor, any other outgoings payable to the State Authority or any local authority;

(b) secondly, in the payment of the expenses (as certified by the Registrar of the Court or Land Administrator, as the case may be) incurred in connection with the making and carrying into effect, of the order for sale;

(c) thirdly, in the payment to the chargee of the total amount due under the charge at the time of the sale;

(d) fourthly, in the case of a charge to secure the payment of an annuity or other periodic sum, in accordance with any provision for the satisfaction of payments subsequently falling due included therein pursuant to paragraph (b) of subsection (2) of section 242; and;

(e) fifthly, in the payment off of subsequently charges, if any, in the order of their priority.

(2) The reference in paragraph (e) of subsection (1) to the payment off of subsequent charges is a reference –

(a) in the case of a charge to secure the re-payment of a debt, or the payment of any sum other than a debt, to the payment to the chargee of the principal sum thereby secured (or much thereof as is then outstanding) together with any interest then due, if any:

(b) in the case of a charge to secure the payment of an annuity or other periodic sum, to the payment to the chargee of all sums then due, and the giving effect to any provision for the satisfaction of payments subsequently falling due included therein as mentioned in paragraph (d) of subsection (1).

(3) The residue, if any, of the purchase money shall, subject to subsection (3) of section 339, be paid to the chargor.

[37] If indeed the plaintiff's proposition is correct, it is improbable that s 268 would have been worded as it is. Instead, the draftsman would have expressly provided that in a case where a chargee has excluded the applicability of s 245 of the NLC to the charge, the chargee would not be entitled to apply the surplus in the manner provided by s 268 without a consolidation order. I therefore do not accept the contention of the plaintiff that consolidation of charges is a prerequisite for the sale proceeds to be applied in accordance with s 268 of the NLC.

[38] I now turn to the case of *Public Finance Bhd v Hock Seng* relied on by the plaintiff. In order to understand the decision in that case, it is necessary to examine the factual matrix:

(a) the defendant executed a charge in favour of the plaintiff bank in respect of 66 pieces of land as listed in Schedule A for monies due under account A;

(b) the defendant also executed another charge in favour of the plaintiff in respect of 215 pieces of land as listed in Schedule B for monies due under account B;

(c) on 6 August 1980, the plaintiff provided a redemption statement to the purchasers who had bought the lands listed under Schedule A based on the redemption price of the unit itself;

(d) on 30 September 1985, the court granted order for sale for the lands listed in Schedule B;

(e) on 7 October 1988, the plaintiff issued a letter that they have consolidated the accounts secured by charge in Schedule A and Schedule B; and

(f) on 5 July 1989, the plaintiff applied for order for sale of the lands in Schedule A based on the amount outstanding in Schedule A and Schedule B;

The court held that:

(a) since the order for sale of the lands in Schedule B had been granted earlier, there was nothing left to consolidate;

(b) it would have been inclined to grant an order for sale of the lands listed in Schedule A only pursuant to the pre-consolidation account but the conduct of the plaintiff in trying to obtain more monies from the innocent purchaser by including the amount due under the first order of sale, amounted to 'cause to the contrary'; and

(c) that the plaintiff was consequently not entitled to an order for sale but the plaintiff was given liberty to commence a fresh foreclosure action under Schedule A based on the pre-consolidation account.

[39] It is important to note that in the above case, unlike the instant case, the chargor had charged more than one piece of land as security. The charges created on the properties in Schedule A and B, contained a provision that was identical to cll 34 and 35. I fail to see how the decision of the court in *Public Finance Bhd* that the plaintiff bank should have applied for consolidation of accounts A and B, before it had obtained an order for sale of the properties in Schedule B supports the proposition advanced by her. In my judgment, the decision of the court giving the bank leave to institute fresh foreclosure proceedings based on the amount outstanding in under Schedule A only, on the contrary, implicitly supports the position taken by the defendant that consolidation is not a requirement.

[40] The determination of the first and second issues in the defendant's favour does not conclude the case. I now turn to consider the other two issues that the plaintiff has raised in this case.

Third issue : Legal fees

[41] It is in evidence that on 13 April 2006, the defendant had provided the plaintiff with a copy of the statement of accounts. It reflected that the defendant had deducted a sum of RM 432,656.08 as legal fees for work done in relation to the first charge. It was common ground that pursuant to the terms of the first, second and third charges, the plaintiff had agreed to pay the legal fees of the defendant's solicitors on a solicitor and client basis.

[42] The plaintiff contended that the defendant was not entitled to deduct the legal fees it had incurred to enforce the first charge from the sale proceeds without first rendering her a bill. If the bill was disputed by the plaintiff, the defendant had an obligation to tax it. Sections 123, 124(1) and (2) of the Legal Profession Act 1965 were relied on to dispute the validity of the deduction made as legal fees.

[43] On the other hand, the defendant argued that the provisions in the Legal Profession Act cited by the plaintiff were inapplicable to this case. Section 123, it was submitted, was a provision that empowered a court to declare that an advocate and solicitor was entitled to a charge on 'a property recovered or preserved' in the action to satisfy the advocate and solicitors fees. It was said that this provision had no application in the present case as there is no issue here of 'recovering and preserving' a property in foreclosure proceedings. In relation to s 124, it was contended, that the provision was applicable where an advocate and solicitor commenced an action for the recovery of costs. The present action, it was submitted, was not an action commenced by an advocate and solicitor to recover costs and consequently, this provision did not avail the plaintiff.

[44] Furthermore, the defendant pointed out that its solicitors had in fact filed in court a bill of costs to tax the fees, but the same was withdrawn upon the request of the plaintiff. It was represented to the bank that it was unnecessary to proceed with taxation as the legal fees due to it had already been paid from the proceeds of sale. The defendant strongly submitted that the court should not permit the plaintiff to blow hot and cold on its position.

[45] Having considered the submissions of the parties, I accept the submissions of the defendant on this point. The provisions in the Legal Profession Act cited by the plaintiff do no assist her as they have no relevance to the facts in this case. As for the bill of costs that was withdrawn by the defendant at the request of the plaintiff, the law does not allow a party to approbate and reprobate. Having elected not to proceed with the taxation, it is not permissible for the plaintiff to take a contrary and inconsistent position now. I therefore hold that the defendant's deduction of the legal fees amounting to RM432,656.08 from the sale proceeds was not wrongful.

Fourth issue: Forfeited sum from the aborted auction

[46] The facts relevant to this issue are as follows. It was in evidence that the defendant received a 10% deposit from an aborted auction sale of the plaintiff's property amounting to RM220,700 pursuant to the order for sale. The deposit had been forfeited on account of the bidder's failure to pay the balance purchase price within 120 days of the sale as stipulated in the conditions of sale.

[47] The plaintiff contended that the defendant has failed to produce evidence to show that the monies had been credited to the plaintiff's account to reduce her indebtedness and sought an order that it be refunded to her. It was contended that the statement of accounts produced by the defendant was undated and thus unreliable and should not be accepted. The defendant's failure to produce the bank ledger to establish that it had credited the monies, it was submitted, called for an adverse inference to be drawn against the defendant.

[48] In response, the defendant argued that the statement of accounts illustrated that the complaint made by the plaintiff was without basis. It showed that the deposit was taken into account in reducing the plaintiff's indebtedness. There was no evidence to suggest that the statement of accounts was inaccurate or unreliable. As for the non-production of the bank ledger, it was argued, there was no basis to draw an adverse inference as no notice to produce the ledger had been given.

[49] Again, I accept the submissions advanced by the defendant. On the evidence, I am not persuaded that the statement of accounts is unreliable and

ought to be rejected. The non-production of the bank ledger does not call for the invocation of an adverse inference in the absence of evidence to show that it was being withheld by the defendant. The case on point is *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, where Mohamed Azmi SCJ observed (at p 494);

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non production of not just any witness but an important and material witness to the case.

[50] I therefore find that there is no basis to order the refund of the sum of RM220,700 to the plaintiff.

CONCLUSION

[51] For the reasons given in this judgment, I dismiss the plaintiff's claim with costs of RM10,000.

Plaintiff's claim dismissed with costs of RM10,000.

Reported by Kanesh Sundrum